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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 PHILIP L. MACHADO,  
11 CDCR #F-64316,

12 Plaintiff,

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14 vs.

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16 ROBERT TILTON,

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19 Defendant.  
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Civil No. 07-2413 JLS (AJB)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE AND GARNISHING  
\$350 BALANCE FROM  
PRISONER'S TRUST ACCOUNT  
[Doc. No. 2]; AND**

**(3) DISMISSING ACTION FOR  
FAILING TO STATE A CLAIM  
PURSUANT TO 28 U.S.C.  
§§ 1915(e)(2)(b)(ii) & 1915A(b)(1)**

22 Plaintiff, Philip Machado, a state inmate currently incarcerated at the Richard J. Donovan  
23 Correctional Facility in San Diego, California and proceeding pro se, has filed a civil rights  
24 action pursuant to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing fee mandated by  
25 28 U.S.C. § 1914(a); instead, he filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant  
26 to 28 U.S.C. § 1915(a) [Doc. No. 2].

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**I. Motion to Proceed IFP [Doc. No. 2]**

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C. § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. Plaintiff's trust account statement shows that he has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281

1 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal  
 2 of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds available to  
 3 him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed  
 4 IFP [Doc. No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However,  
 5 the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk  
 6 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

### 7 **III. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

#### 8 **A. Standard**

9 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
 10 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
 11 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
 12 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
 13 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
 14 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion  
 15 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from  
 16 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203  
 17 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,  
 18 446 (9th Cir. 2000) (§ 1915A).

19 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
 20 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
 21 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
 22 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing  
 23 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of  
 24 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection  
 25 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint  
 26 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)  
 27 (discussing 28 U.S.C. § 1915A).

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1 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
2 allegations of material fact and must construe those facts in the light most favorable to the  
3 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
4 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s  
5 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,  
6 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*  
7 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

8 **B. 42 U.S.C. § 1983 Liability**

9 Because the Court has a duty to liberally construe Plaintiff’s Complaint, the Court finds  
10 that the allegations and claims in Plaintiff’s Complaint arise under 42 U.S.C. § 1983. However,  
11 as currently pleaded, it is clear that a majority of Plaintiff’s Complaint fails to state a cognizable  
12 claim under 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements upon a  
13 claimant: (1) that a person acting under color of state law committed the conduct at issue, and  
14 (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the  
15 Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S.  
16 637, 124 S.Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en  
17 banc).

18 As one of his remedies, Plaintiff is seeking a “discharge from prison and parole.”  
19 (Compl. at 8.) However, [i]n any § 1983 action, the first question is whether § 1983 is the  
20 appropriate avenue to remedy the alleged wrong.” *Haygood v. Younger*, 769 F.2d 1350, 1353  
21 (9th Cir. 1985) (en banc). A prisoner in state custody simply may not use a § 1983 civil rights  
22 action to challenge the “fact or duration of his confinement.” *Preiser v. Rodriguez*, 411 U.S.  
23 475, 489 (1973). The prisoner must seek federal habeas corpus relief instead. *Wilkinson v.*  
24 *Dotson*, 544 U.S. 74, 78 (2005) (*quoting Preiser*, 411 U.S. at 489). Thus, if Plaintiff is seeking  
25 a remedy in the form of release from prison, he cannot seek such a remedy in a § 1983 action.

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1           **C.     Respondeat Superior Claims**

2           The only named Defendant in Plaintiff's Complaint is "Robert Tilton, Director of  
3 Corrections." (Compl. at 1-2.) However, Plaintiff does not allege any specific factual  
4 allegations as to this Defendant in the body of the Complaint. Thus, it appears that Plaintiff is  
5 seeking to hold Defendant Tilton liable in his supervisory capacity. (Compl. at 1.) However,  
6 there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d  
7 1433, 1437-38 (9th Cir. 1993). Instead, "[t]he inquiry into causation must be individualized and  
8 focus on the duties and responsibilities of each individual defendant whose acts or omissions are  
9 alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th  
10 Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)). In order to avoid the  
11 respondeat superior bar, Plaintiff must allege personal acts by each individual Defendant which  
12 have a direct causal connection to the constitutional violation at issue. *See Sanders v. Kennedy*,  
13 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). As a  
14 supervisor, a Defendant may only be held liable for the allegedly unconstitutional violations of  
15 his subordinates if Plaintiff alleges specific facts which show: (1) how or to what extent this  
16 supervisor personally participated in or directed Defendants' actions, and (2) in either acting or  
17 failing to act, the supervisor was an actual and proximate cause of the deprivation of his  
18 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pleaded,  
19 however, Plaintiff's Complaint fails to set forth facts sufficient to support an individualized  
20 constitutional claim against Director Tilton.

21           **D.     Eighth Amendment Claims**

22           In his Complaint, Plaintiff alleges that prison officials have violated his Eighth  
23 Amendment right to be free from cruel and unusual punishment by allowing overcrowding in  
24 the prisons. However, these allegations of overcrowding are insufficient to state an Eighth  
25 Amendment claim. *See Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 471 (9th Cir.  
26 1989).

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1 The Eighth Amendment, which prohibits “cruel and unusual punishments,” imposes a  
2 duty on prison officials to provide humane conditions of confinement and to take reasonable  
3 measures to guarantee the safety of the inmates. *Helling v. McKinney*, 509 U.S. 25, 31-33  
4 (1993). However, every injury suffered by an inmate does not necessarily translate into  
5 constitutional liability for prison officials. *Osolinski v. Kane*, 92 F.3d 934, 936-37 (9th Cir.  
6 1996); *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (noting that the U.S. Constitution “does  
7 not mandate comfortable prisons.”). Thus, to assert an Eighth Amendment claim for deprivation  
8 of humane conditions of confinement, however, a prisoner must satisfy two requirements: one  
9 objective and one subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Allen v. Sakai*, 48  
10 F.3d 1082, 1087 (9th Cir. 1994). Under the objective requirement, the plaintiff must allege facts  
11 sufficient to show that “a prison official’s acts or omissions . . . result[ed] in the denial of the  
12 ‘minimal civilized measure of life’s necessities.’” *Farmer*, 511 U.S. at 834 (quoting *Rhodes*,  
13 452 U.S. at 347). This objective component is satisfied so long as the institution “furnishes  
14 sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal  
15 safety.” *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982); *Farmer*, 511 U.S. at 534; *Wright*  
16 *v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981). The subjective requirement, relating to the  
17 defendant’s state of mind, requires that the plaintiff allege facts sufficient to show “deliberate  
18 indifference.” *Allen*, 48 F.3d at 1087. “Deliberate indifference” exists when a prison official  
19 “knows of and disregards an excessive risk to inmate health and safety; the official must be both  
20 aware of facts from which the inference could be drawn that a substantial risk of serious harm  
21 exists, and he must also draw the inference.” *Farmer*, 511 U.S. at 837.

22 Here, however, Plaintiff’s allegations fail to state an Eighth Amendment overcrowding  
23 claim. As currently pleaded, the Court finds that Plaintiff alleges no facts sufficient to show that  
24 the conditions in Donovan were objectively and demonstrably unsafe. *See Helling*, 509 U.S. at  
25 36 (exposure to demonstrably unsafe conditions may violate the Eighth Amendment if the  
26 inmate can show that the risk he faced was “so grave that it violates contemporary standards of  
27 decency”). Other than allegations that he is unable to sleep peacefully at times, Plaintiff alleges  
28 no injury that rises to the level of an Eighth Amendment violation. To the extent that Plaintiff

1 is seeking money damages for mental or emotional suffering, he must allege a physical injury  
2 that is more than “*de minimus*.” *See Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002).

3 Accordingly, the Court finds that Plaintiff’s Complaint fails to state a section 1983 claim  
4 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.  
5 §§ 1915(e)(2)(b) & 1915A(b). Because it is not altogether certain that Plaintiff would be unable  
6 to allege any additional facts related to the conditions under which he was injured, however, the  
7 Court will provide Plaintiff with an opportunity to amend his pleading in light of the standards  
8 set forth above. *See Lopez*, 203 F.3d at 1130-31.

#### 9 **IV. Conclusion and Order**

10 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

11 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is  
12 **GRANTED**.

13 2. The Secretary of California Department of Corrections and Rehabilitation, or his  
14 designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee  
15 owed in this case by collecting monthly payments from the account in an amount equal to twenty  
16 percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court  
17 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).  
18 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
19 ASSIGNED TO THIS ACTION.

20 3. The Clerk of the Court is directed to serve a copy of this Order on James Tilton,  
21 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
22 Sacramento, California 95814.

23 **IT IS FURTHER ORDERED** that:

24 4. Plaintiff’s Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.  
25 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave  
26 from the date this Order is “Filed” in which to file a First Amended Complaint which cures all  
27 the deficiencies of pleading noted above. Plaintiff’s Amended Complaint must be complete in  
28 itself without reference to the superseded pleading. *See S.D. Cal. Civ. L. R. 15.1*. Defendants

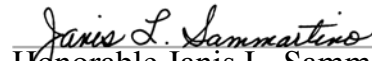


1 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been  
2 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended  
3 Complaint fails to state a claim upon which relief may be granted, it may be dismissed without  
4 further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g).  
5 *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

6         6.         The Clerk of the Court is directed to mail a Court approved form § 1983 complaint  
7 to Plaintiff.

8 **IT IS SO ORDERED.**

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10 DATED: March 4, 2008

11   
12 Honorable Janis L. Sammartino  
13 United States District Judge  
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